IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL NO. 140 OF 1988

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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JADEJA RANJITSINH @ BHIKHABHA RAMSANGJI - Appellant(s)
Versus
FATMABAI WD/O KHOJA GULAMHUSSEN JETHABHAI - Respondent(s)

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Appearance :
SHRI B.Y. MANKAD for Appellant(s).
SHRI M.S. SHAH for SHRI SURESH M. SHAH for Respondent(s).

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 29/11/2006

ORAL JUDGMENT

1. One Khoja Gulamhussen Jethabhai (since deceased) filed a civil suit against the present appellant for redemption of mortgage. It was alleged by

the plaintiffs that the property in dispute was mortgaged with possession with the father of the defendant, namely, Ramsinghji on 15th January 1956 for a sum of Rs.2,500/- for a period of ten years. It was also submitted that the mortgage deed was not registered. It was further submitted that after the expiry of the mortgage period of ten years, the plaintiffs asked the defendant to redeem the property, but, the defendant failed in his duty, therefore, the plaintiffs had to file the suit.

1.1 The defendant filed his written statement at Exh.14 denying the pleadings, raising further pleadings that the suit was bad for non-joinder of parties as the deceased was not survived by the defendant only, but, there were other legal representatives/successors of the deceased mortgagee. It is to be noted that in the pleadings, the defendant did not say that who were other successors of the deceased mortgagee. The pleadings were not complete, rather the pleadings were evasive and were suppressing the material facts.

1.2 The learned trial Court framed as many as six issues, Issue No.2 was in relation to non-joinder of necessary parties. The learned trial Court, in its judgement dated 21st March, 1984, observed that though the

defendant had taken the contention regarding non-joinder of necessary parties and that the suit was barred by limitation, but, the defendant had failed in proving the same. The learned trial Court, accordingly, decreed the suit and directed framing of a preliminary decree.

1.3 Being aggrieved by the said judgement and decree, the appellant-defendant preferred Regular Civil Appeal No.65 of 1984, which came to be dismissed by the learned Extra Assistant Judge, Kutch at Bhuj on 2nd February, 1988.

2. The present appeal has been admitted for hearing the parties on the following substantial question of law:

> *"Whether the suit was bad in law and not maintainable and whether the preliminary decree for redemption was bad in law and ineffective because the sister of the defendant, who is one of the co-mortgagees, was not joined in the suit and because under the imperative provisions of O.34, Rule 1 C.P.C., all persons having an interest in the mortgage-security `shall' be joined as parties to the suit?"*

3. The learned Counsel for the appellant submits

that in view of the mandatory language of Order-XXXIV Rule 1 of the Code of Civil Procedure, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. According to him, as the sister of the present appellant was not joined as party defendant, the suit was bad and was liable to be dismissed. Placing reliance upon a judgement of the Andhra Pradesh High Court reported in the case of ***P. Govinda Reddy & Ors. vs. Golla Obulamma***,[***AIR 1971 A.P. 363***], it is submitted that after the death of a Hindu, the property would be succeeded either under Section 6 or Section 8 of the Hindu Succession Act and the daughter, being Class-I heir, would succeed to the property and the rights which the deceased had in the mortgaged property. According to him, in absence of the sister of the present appellant, an effective decree could not be granted.

4. On the other hand, the learned Counsel for the respondents-plaintiffs, placing reliance upon a judgement of the Supreme Court in the case of ***Nagubai Ammal & Ors. vs. B. Shama Rao & Ors.***, [***AIR 1956 SC 593***], submits that the suit would not be bad and at best, it can be said to be a defective suit and in any case, the decree would be binding upon the present defendant.

5. It is to be seen from the written statement that the defendant did not disclose the details of other legal representatives, he did not inform to the plaintiffs that there were other legal representatives nor it is said to the Court that what were the names and other details of such other successors. It appears that the defendant wanted to keep an ace up his sleeves with an intention to use at the time when they needed. Abruptly, during the course of evidence, the defendant started suggesting the Court that the deceased was survived by the appellant and his sister.

6. The plaintiffs, in their evidence, have stated that they did not know that the deceased was survived by a daughter also. It was submitted that they knew about the defendant only.

7. It is to be noted at this stage that immediately after the notice for redemption was issued, the defendant did not give any reply, nor did he say that the notice should be issued to two persons.

8. It appears that by keeping absolute silence and suppressing the fact, the defendant was preparing a

foundation in his favour to raise a plea of non-joinder of parties.

9. In the matter of ***Nagubai Ammal*** (*supra*), the Supreme Court observed that the observations made in the case of ***Kala Chand Banerjee vs. Jagannath Marwari***, [***1927 PC 108***], would directly cover the point as they embody a principle adopted in the law of this country as to the effect of a sale in execution of a decree passed in a defectively constituted mortgage suit. According to the Privy Council, such a sale does not affect the rights of redemption of persons interested in the equity of redemption, who have not been impleaded as parties to the action as they should have been issued notice under Order XXXIV Rule 1 of the Code of Civil Procedure, but, that it is valid and effective as against parties to the action.

10. In the circumstances of the case, I must hold that the plaintiffs' suit, in view of the special circumstances of the case, was maintainable and decree to the extent of the defendant's right could always be granted in favour of the plaintiffs. I make it clear that the learned trial Court was not right and justified, nor the Appellate Court was justified in confirming the finding that the sister of the defendant had no rights in

the property. Such question could be decided by that Court if the sister of the defendant was joined as party defendant. In absence of the interested person, any issue affecting his right could not be decided.

11. The plaintiffs would be entitled to a decree of redemption against the rights of the present defendant only. The decree is, accordingly, modified. The appeal stands disposed of. No costs.

[R.S.Garg, J.]

*kamlesh**